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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FAUSTINO ORTIZ RUA,

Defendant and Appellant.

F047503

(Super. Ct. No. F04906829-7)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Lawrence Jones, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Stan Cross and Janet E. Neeley, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found Faustino Ortiz Rua guilty in count 1 of continuous sexual abuse of his daughter, a child under 14 years of age (§ 288.5, subd. (a)<sup>1</sup>), in counts 2-5 of a lewd act on his daughter, a child under 14 years of age (§ 288, subd. (a)), in count 6 of a lewd

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise noted.

act on his daughter, a child 14 or 15 years of age and 10 or more years younger than he (§ 288, subd. (c)(1)), and in count 9 of a forcible rape of his daughter (§ 261, subd. (a)(2)).<sup>2</sup> In each count, the jury found true the sentencing allegations that he “took advantage of a position of trust or confidence,” that his daughter was “a particularly vulnerable victim,” and that the crime “involved a high degree of callousness and/or cruelty.” (See Cal. Rules of Court, rule 4.421(a)(1), (3), (11).) In counts 1-6, the jury found true the allegations extending the statute of limitations. (Former § 803, subd. (g) (“former § 803(g)”).)<sup>3</sup> The court sentenced him to an aggregate term of 24 years and 8 months in prison – an aggravated term of 16 years on count 1, a consecutive term of 8 months on count 6, and a consecutive aggravated term of 8 years on count 9 – and dismissed counts 2-5. (§§ 264, subd. (a), 288, subd. (a), 288.5, subd. (a).)

Rua raises six issues on appeal. First, he argues that two evidentiary rulings on questions about his daughter’s character constituted a miscarriage of justice and denied his constitutional right to present a defense at a fair trial. Second, he argues that instructing the jury with CALJIC No. 2.24 on witness believability and evidence of character for honesty or truthfulness constituted a miscarriage of justice and denied his constitutional right to due process. Third, he argues that instructing the jury with CALJIC No. 2.02 instead of with CALJIC No. 2.01 constituted a miscarriage of justice and denied his constitutional right to due process.

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<sup>2</sup> The court granted the prosecutor’s motion to dismiss counts 7 and 8, which charged, respectively, a lewd act on Rua’s daughter, a child 14 or 15 years of age and 10 or more years younger than he (§ 288, subd. (c)(1)), and unlawful sexual intercourse with his daughter, a person under 18 years of age and more than three years younger than he (§ 261.5, subd. (c)).

<sup>3</sup> At the time of trial, former section 803(g) set out a special statute of limitations for sex crimes against children. A spate of statutory amendments ensued. (Stats. 2003-2004, 4th Ex. Sess., ch. 2, § 7, eff. March 1, 2005; Stats. 2005, ch. 2, §§ 1-3, eff. Feb. 28, 2005; Stats. 2005, ch. 479, § 3.)

Fourth, he argues that instructing the jury on preponderance of the evidence and clear and convincing evidence as the burdens of proof of extension of the statute of limitations and independent corroboration of the child's accusations, respectively, denied his constitutional due process and jury guarantees of proof beyond a reasonable doubt. Fifth, he argues that the cumulative effect of "a series of trial errors" constituted a miscarriage of justice and denied his constitutional right to a fair trial. Sixth, on the premise that the court failed to exercise informed discretion at sentencing, he argues that imposition of aggravated terms denied his constitutional right to due process and requires a remand for resentencing.

Although we will agree with Rua that two evidentiary rulings on questions about his daughter's character were erroneous, we will conclude that neither prejudiced him. On a record with no other error, we will affirm the judgment.

## **DISCUSSION**

### ***1. Two Evidentiary Rulings***

Rua argues that two evidentiary rulings on questions about his daughter's character constituted a miscarriage of justice and denied his constitutional right to present a defense at a fair trial. The Attorney General argues that the rulings were correct and that error, if any, did not prejudice him.

Both rulings – one on the court's own motion, the other on an objection by the prosecutor – arose during the testimony of Rua's sister. The prosecutor stated no ground for her objection. Likewise, the court stated no ground for either ruling.

"[RUA'S ATTORNEY]: Q. Are you aware of any *specific instances* when [Rua's daughter] had lied?

"A. Well, I knew, but through her mother.

"THE COURT: All right. The answer is stricken. The jury is admonished to disregard it.

“[RUA’S ATTORNEY]: Q. Do you have a personal *opinion* as to whether or not [Rua’s daughter] lies?

“A. I knew that she lied at school, but I don’t know exactly about what.

“[PROSECUTOR]: Objection, move to strike.

“THE COURT: The answer is stricken. The jury is admonished to disregard it.” (Italics added.)

Preliminarily, the record shows no Evidence Code section 352 basis – either expressly or implicitly – in the prosecutor’s objection or the court’s rulings.<sup>4</sup> That record precludes consideration of Evidence Code section 352 as a ground on which the court might have grounded those rulings (*People v. Ward* (2005) 36 Cal.4th 186, 211; *People v. Wash* (1993) 6 Cal.4th 215, 244) and renders inapposite the cases the Attorney General cites articulating appellate court deference to trial court discretion in making Evidence Code section 352 rulings (*People v. Edwards* (1991) 54 Cal.3d 787, 817; *People v. Karis* (1988) 46 Cal.3d 612, 637).

So the question is whether the evidence at issue in those rulings might otherwise have been admissible. Evidence Code section 1324 codifies “a well-settled exception to the hearsay rule” so as to make “reputation evidence as to character or a trait of character” admissible under the rule.<sup>5</sup> (7 Cal. Law Revision Com. Rep. (1965) p. 1.) Evidence Code section 1100 generally allows “any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of

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<sup>4</sup> Evidence Code section 352: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

<sup>5</sup> Evidence Code section 1324: “Evidence of a person’s general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule.”

specific instances of such person's conduct)" as character evidence.<sup>6</sup> Although Evidence Code section 1101 generally prohibits character evidence to prove conduct on a specific occasion, Evidence Code section 1103, subdivision (a) states an exception to the rule specifically to allow in criminal cases character evidence "in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct" to prove a victim's conduct in conformity with his or her character.<sup>7</sup> None of those statutes makes the evidence at issue in the court's two rulings inadmissible.

On the ground that "the questions asked of [Rua's sister] referred *only to specific instances* of [his daughter's] having told a lie, and not to her character trait for honesty or veracity," the Attorney General relies on Evidence Code section 787 for his argument that the court's rulings were correct.<sup>8</sup> (Italics added.) First, the Attorney General misstates the record, which shows that Rua's attorney expressly asked not only for *specific instances* but also for the witness's *opinion*. Second, the Attorney General overlooks the electorate's passage in 1982 of Proposition 8, which repealed Evidence

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<sup>6</sup> Evidence Code section 1100: "Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character."

<sup>7</sup> Evidence Code section 1101 states the general rule that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) Evidence Code section 1103, subd. (a)(1) states an exception to the general rule: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

<sup>8</sup> Evidence Code section 787 states that "evidence of *specific instances* of [a witness's] conduct relevant only as tending to prove a trait of his [or her] character is inadmissible to attack or support the credibility of a witness." (Italics added.)

Code section 787 in criminal cases. (Cal. Const., art. I, § 28, subd. (d); *People v. Harris* (1989) 47 Cal.3d 1047, 1080-1082, not followed as dictum on another ground by *People v. Wheeler* (1992) 4 Cal.4th 284, 299, fn. 10.) On that state of the briefing and the record, we conclude that the rulings at issue were erroneous. So we turn to the issue of prejudice.

The premise of Rua's prejudice argument is that his daughter had "abundant motive to lie." He emphasizes her testimony that when her mother found out about one of her pregnancies she screamed at her and called her a prostitute in the belief that she was sleeping around. He draws attention to her testimony that some time later when she told her husband about the molestations he seemed shocked that she had not done anything. Rua accuses his daughter of lying because a detective testified that she told him she had three abortions but an obstetrician-gynecologist testified that her medical records showed four abortions.

Rua's prejudice argument is not at all persuasive. Evidence suggestive of a normal father and daughter relationship was scant. Rua's sister, the witness during whose brief testimony the rulings at issue arose, testified that she saw a beautiful father and daughter relationship between Rua and his daughter but admitted that she usually visited just once every other year since she lived hours away. All of the other evidence was to the contrary.

Rua's daughter testified that if she did not follow her father's rules he hit her with a belt or threatened to take the family back to Mexico, that he had sexual intercourse with her from ages 8 to 18, that he bought her dresses to wear and vodka to drink and took her to hotels and nightclubs, that he took her to get her three or four abortions, and that she had sexual intercourse with no one else until she got married at age 18. His wife testified that their daughter obeyed the household rules he set and that he never let her go out on dates as a teenager or take part in after-school activities. His niece, two years older than

his daughter, testified that they did not get to play together much since he did not allow her to go out at times. A hotel manager testified that Rua's name was on receipts there.

Not only is overwhelming evidence of Rua's guilt in the record but also neither of the rulings at issue seems to have excluded any evidence that could have materially aided his defense. First, his sister testified that she knew "through her mother" about specific instances when his daughter had lied. Her mother testified, however, and Rua makes no claim that the court improperly limited his cross-examination of her. Second, his sister testified to her personal opinion "that she lied at school" but admitted she did not "know exactly about what." Rua fails to show how the admission in evidence of a bare opinion like that – entirely devoid of detail and from a relative who only infrequently visited his daughter from afar – could possibly have helped him.

By the federal standard of review both erroneous rulings were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; U.S. Const., 6th & 14th Amends.) By the state standard of review, a verdict more favorable to Rua was not reasonably probable in the absence of those errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836; Cal. Const., art. VI, § 13.)

## **2. CALJIC No. 2.24**

Rua argues that instructing the jury with CALJIC No. 2.24 on witness believability and evidence of character for honesty or truthfulness constituted a miscarriage of justice and denied his constitutional right to due process.<sup>9</sup> The Attorney General argues the contrary.

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<sup>9</sup> CALJIC No. 2.24: "Evidence of the character of a witness for honesty or truthfulness may be considered in determining his or her believability. [¶] If the evidence establishes that a witness'[s] character for honesty or truthfulness has not been discussed among those who know him or her, you may infer from the absence of discussion that the witness'[s] character for those traits is good."

The premise of Rua’s argument is that “character evidence of a witness for honesty or truthfulness was *not* admitted.” However, as the Attorney General notes, her mother *did* testify about their daughter’s character for honesty or truthfulness:

“Q Did she ever lie?

“A Sometimes she would.

“Q What would she lie about?

“A I would ask her where – where did you guys go out to and she would say, ‘Oh, we just went to the stores.’

“Q And how did you know that to be a lie?

“A Well, because what store would be open at 1:00, 2:00 in the morning[?]

“Q So when she came home at 1:00 or 2:00 in the morning, who would she have been with?

“A With [Rua].”

For want of a valid premise, Rua’s argument fails. The court did not err by instructing the jury with CALJIC No. 2.24.

### **3. CALJIC Nos. 2.01 and 2.02**

Rua argues that instructing the jury with CALJIC No. 2.02 instead of with CALJIC No. 2.01 constituted a miscarriage of justice and denied his constitutional right to due process.<sup>10</sup> The Attorney General argues the contrary.

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<sup>10</sup> CALJIC No. 2.01: “However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant’s guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant’s guilt and

After the court informed counsel that the jury was to receive CALJIC No. 2.02, Rua instead requested CALJIC No. 2.01, “the broader interpretation of the circumstantial evidence rule,” on the rationale that the circumstantial evidence in the case was relevant to more than just specific intent. The court characterized the testimony of Rua’s daughter as direct evidence of his guilt and the rest of the case as corroborative of her testimony, found that the case did not rest “substantially or entirely on circumstantial evidence,” and declined to instruct with CALJIC No. 2.01. The use note to the version of CALJIC No. 2.01 in effect at the time of trial stated: “This or a similar instruction must be given by the court on its own motion where the case of the people rests *substantially or entirely on circumstantial evidence.*” (Use Note to CALJIC No. 2.01 (Jan. 2005 ed.) p. 32, italics added.) “Indeed, where circumstantial inference is not the primary means by which the prosecution seeks to establish that the defendant engaged in criminal conduct, the instruction may confuse and mislead, and thus should not be given. [Citations.]” (*People v. Anderson* (2001) 25 Cal.4th 543, 582.) Circumstantial evidence instructions

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the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant’s innocence, and reject that interpretation that points to [his] [her] guilt. [¶] If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.”

CALJIC No. 2.02: “The specific intent with which an act is done may be shown by the circumstances surrounding the commission of the act, however, you may not find a defendant guilty of the crimes charged in Counts Two, Three, Four, Five, Six, and that section of Count One which alleges three or more acts, in violation of Section 288(a) of the Penal Code unless the proved circumstances are not only, one, consistent with the theory that the defendant had the required specific intent but, two, cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to any specific intent permits two reasonable interpretations, one of which points to the existence of the specific intent and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.”

“are required only when the prosecution substantially relies on circumstantial evidence.”  
(*People v. Dunkle* (2005) 36 Cal.4th 861, 927.)

The testimony of Rua’s daughter established the actus reus of each charged crime by direct evidence that circumstantial evidence merely corroborated. Her testimony and other direct evidence were the primary means by which the prosecution proved allegations extending the statute of limitations. On the subtler mens rea issue of specific intent, on the other hand, the jury necessarily had to make inferences from her testimony. On that record, the court adequately instructed on “the general principles of law governing the case” by giving CALJIC No. 2.02 on specific intent and by declining to give CALJIC No. 2.01. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

#### **4. *Burdens of Proof***

Rua argues that instructing the jury on preponderance of the evidence and clear and convincing evidence as the burdens of proof of extension of the statute of limitations and independent corroboration of the child’s accusations, respectively, denied his constitutional due process and jury guarantees of proof beyond a reasonable doubt. The Attorney General argues the contrary.

At the time of Rua’s trial, former section 803(g) permitted prosecution of specified sex crimes against a child after expiration of the normal statutes of limitations in sections 800 and 801 if (1) the child reported to law enforcement (2) a crime involving substantial sexual conduct (3) that independent evidence clearly and convincingly corroborated (4) if prosecution began within one year of the child’s report. (*People v. Linder* (2006) 139 Cal.App.4th 75, 81 (*Linder*), citing *People v. Vasquez* (2004) 118 Cal.App.4th 501, 505; cf. §§ 800 [6-year statute of limitations for crimes punishable by no less than eight years in prison], 801 [3-year statute of limitations for crimes punishable by 16 months, 2 years, or 3 years in prison].) The court instructed the jury with former section 803(g) as follows:

“Penal Code sections 801 and 800 require that the prosecution for a violation of Penal Code section 288.5, 288(a), 288(c)(1) be commenced within three years and six years respectively after commission of the offense. A criminal complaint commenced in this prosecution for the purposes of this section. However, Penal Code section 803(g) provides that notwithstanding the requirements of the Penal Code, sections 801 and 800, the statute of limitations will be extended provided all of the following requirements are met:

“One, a report was made to a law enforcement officer by a person – by a person alleging that person was the victim of a sexual offense while under the age of 18;

“Two, a complaint was filed within one year of the date of that report;

“Three, the three-year and/or six-year limitation periods contained in Penal Code sections 801 and 800 have expired;

“Four, the charged crime involves substantial sexual conduct;

“And five, there is independent evidence that *clearly and convincingly* corroborates the victim’s allegation.

“The term substantial sexual conduct means penetration of the vagina or rectum of either the victim or the defendant by the penis of the other or by any foreign object, oral copulation or masturbation of either the victim or the offender.

“Masturbation includes any contact, however slight, of the sexual organ of the victim by the offender.

“Additionally, independent evidence that corroborates the victim’s allegation may be based upon a sexual offense or offenses other than those charged in this case.

“The People have the burden of proving by a *preponderance of the evidence* that the requirements of Penal Code section 803(g) have been met, and *clearly and convincingly* that there is independent evidence corroborating the victim’s allegations.

“To corroborate the testimony of [Rua’s daughter], there must be evidence of some act or fact related to the crime which if believed by itself and without any aid interpretation or direction from the testimony of [Rua’s daughter] tends to connect the defendant with the commission of the crimes

charged. However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crimes charged or that it corroborates every fact to which [Rua's daughter] testified.

"In determining whether [Rua's daughter]'s testimony has been corroborated, you must first assume that her testimony has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crimes. If there is no independent evidence which tends to connect the defendant with the commission of the crimes, the testimony of [Rua's daughter] is not corroborated. If there is independent evidence which you believe, then the testimony of [Rua's daughter] is corroborated.

"*Clearly and convincingly* means evidence that demonstrates a high probability of truth of the facts for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a *preponderance of the evidence*.

"*Preponderance of the evidence* means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates your finding on that issue must be against the party who had the burden of proving it." (Italics added.)

The United States Constitution indisputably "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364 (*Winship*)). Extrapolating from *Winship*, Rua argues that a line of later United States Supreme Court cases shows that proof beyond a reasonable doubt is likewise necessary both for extension of the statute of limitations and for independent corroboration of the child's accusations. (See *Sandstrom v. Montana* (1978) 442 U.S. 510 (*Sandstrom*); *Sullivan v. Louisiana* (1993) 508 U.S. 275 (*Sullivan*); *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*); *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*); *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); *United States v. Booker* (2005) 543 U.S. 220 (*Booker*)). We read those cases differently.

First, none of the facts relevant to extension of the statute of limitations and independent corroboration of the child's accusations is a "fact necessary to constitute the crime with which [Rua wa]s charged." (Cf. *Winship*, *supra*, 397 U.S. at p. 364; see *People v. Frazer* (1999) 21 Cal.4th 737, 760-761, fn. 22, overruled on another ground by *Stogner v. California* (2003) 539 U.S. 607, 609-633.) "Although the right to maintain the action is an essential part of the final power to pronounce judgment, that right 'constitutes no part of the crime itself.' [Citation.]" (*Linder*, *supra*, 139 Cal.App.4th at p. 84; see *United States v. Cook* (1872) 84 U.S. 168, 179-182; *United States v. Titterington* (6th Cir. 2004) 374 F.3d 453, 456-460.)

Second, the later cases on which Rua relies require the prosecution to prove to a jury "'every ingredient of an offense beyond a reasonable doubt.'" (*Sandstrom*, *supra*, 442 U.S. at p. 524; see *Sullivan*, *supra*, 508 U.S. at p. 278; *Apprendi*, *supra*, 530 U.S. at p. 490; see *Ring*, *supra*, 536 U.S. at p. 588; *Blakeley*, *supra*, 542 U.S. at p. 301; *Booker*, *supra*, 543 U.S. at p. 231.) The statute of limitations is not an ingredient of an offense, however, but a substantive matter for which the prosecution's burden of proof is a preponderance of the evidence. (*People v. Le* (2000) 82 Cal.App.4th 1352, 1360, citing *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 374; *People v. Zamora* (1976) 18 Cal.3d 538, 566, fn. 27 (*Zamora*).) "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions." (*Toussie v. United States* (1970) 397 U.S. 112, 114, overruled by statute on another ground as stated by, e.g., *United States v. Martinez* (10th Cir. 1989) 890 F.2d 1088, 1091-1092.)

Third, California case law and statutory law designate preponderance of the evidence as the standard of proof of statute of limitations issues (*Zamora*, *supra*, 18 Cal.3d at p. 565, fn. 27; *People v. Angel* (1999) 70 Cal.App.4th 1141, 1146-1147; see generally *People v. McGill* (1935) 10 Cal.App.2d 155, 159-160; § 1102; Evid. Code,

§ 115) and clear and convincing evidence as the standard of proof of independent corroboration of the children's accusations (*People v. Ruiloba* (2005) 131 Cal.App.4th 674, 681-693; *People v. Zandrino* (2002) 100 Cal.App.4th 74, 84, fn. 6; former § 803(g)). Since Rua fails to persuade us of any constitutional mandate to the contrary, we apply California case law and statutory law to reject his burdens of proof argument.

### **5. Cumulative Error**

Rua argues that the cumulative effect of “a series of trial errors” constituted a miscarriage of justice and denied his constitutional right to a fair trial. The Attorney General argues the contrary.

From our careful review of the entire record, we have concluded that the court erred in making two evidentiary rulings, neither of which prejudiced Rua (*ante*, part 1), and that otherwise the court did not err (*ante*, parts 2-4). On that record, there is no cumulative error that could require reversal of the judgment. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1344.) “A defendant is entitled to a fair trial but not a perfect one.” (*Lutwak v. United States* (1953) 344 U.S. 604, 619.) Rua received a fair trial.

### **6. Sentencing**

On the premise that the court failed to exercise informed discretion at sentencing, Rua argues that imposition of aggravated terms denied his constitutional right to due process and requires a remand for resentencing. The Attorney General argues that Rua forfeited his right to appellate review and that the court did not err in imposing aggravated terms.

Preliminarily, we turn to the Attorney General's forfeiture argument. Although the record shows no objection by Rua to imposition of aggravated terms, his sentencing came after *Blakely* but before the California Supreme Court had spoken on the effect, if any, of *Blakely* on the determinate sentencing law (DSL). We cannot expect prescience of counsel (see *People v. Turner* (1990) 50 Cal.3d 668, 703), so we reject the Attorney

General's forfeiture argument (cf. *People v. Scott* (1994) 9 Cal.4th 331, 357-358, limited on another ground by *People v. Stowell* (2003) 31 Cal.4th 1107, 1112-1113) and turn to the issue of whether the court erred in imposing aggravated terms.

Each count of the information contained sentencing allegations that Rua "took advantage of a position of trust or confidence," that his daughter was "a particularly vulnerable victim," and that the crime "involved a high degree of callousness and/or cruelty." (See Cal. Rules of Court, rule 4.421(a)(1), (3), (11).) The prosecutor said he inserted that language "for *Blakely* purposes" to enable the jury to "make a finding for purposes of an aggravated sentence." Noting the constitutional requirement of a jury finding if *Blakely* were to apply, the court surmised that "that language probably is going to be in any case until we get some rulings from our California Supreme Court." In each count, the jury found the sentencing allegations true.

At sentencing, the prosecutor requested imposition of the aggravated term since "the aggravating factors far outweigh the single mitigating factor that this man has no known record." Emphasizing the mitigating factor, Rua's attorney requested imposition of the middle term. After reading into the record the jury's findings on the sentencing allegations, the court made findings of three circumstances in aggravation – that Rua's daughter "was particularly vulnerable, [he] took advantage of a position of trust or confidence, and the crime involved a high degree of cruelty or callousness" – and one circumstance in mitigation – that he "has no prior record, or an insignificant record" – and found that the circumstances in aggravation outweighed the circumstance in mitigation and that the requirements of *Blakely* were satisfied. On that foundation, the court imposed aggravated terms on counts 1 and 8 – an aggravated term of 16 years on count 1, a consecutive term of 8 months on count 6, and a consecutive aggravated term of 8 years on count 9 – and dismissed counts 2-5. (§§ 264, subd. (a), 288, subd. (a), 288.5, subd. (a).)

Inferring from the record that the court thought *Blakely* required jury findings on circumstances in aggravation, Rua argues that a lack of “informed discretion” ensued that requires a remand for resentencing. We disagree. The record shows that the court acknowledged the possible constitutional impact of *Blakely* and the appropriateness of interim sentencing allegation language but nonetheless shows that the court independently found that three circumstances in aggravation and one circumstance in mitigation were true and that the former outweighed the latter. A few months later, *People v. Black* (2005) 35 Cal.4th 1238 addressed the effect of *Blakely* and *Booker* on the DSL and concluded that the judicial factfinding that occurs when a judge exercises discretion to impose an aggravated term does not implicate the Sixth Amendment right to a jury trial. (*Id.* at p. 1244.)

For want of a valid premise, Rua’s argument fails. The court’s commendable caution at a time of a possible sea change in DSL sentencing in no way negates the showing in the record of the court’s exercise of informed discretion at sentencing.

### **DISPOSITION**

The judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Cornell, J.